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Copyright Law Revision: Unilateral Federal Protection

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NOTES

COPYRIGHT LAW REVISION: UNILATERAL FEDERAL PROTECTION †

The federal system of government utilized in the United States reserves a certain degree of sovereignty to each state. In order to provide uniformity in matters which affect more than one jurisdiction, it is often necessary for the federal government to supersede state authority. It became apparent, early in the development of the United States, that copyright protection would require such nationwide uniformity.

Since the Articles of Confederation lacked any provision for federal copyright protection, various states filled the void either by continuing the common-law doctrine of protection until publication or by enacting statutory provisions. As early as 1783, Connecticut, Massachusetts, Maryland and Rhode Island had passed copyright legislation. Since a state's authority can extend no farther than its jurisdictional limits, to protect his work fully an author [1] had to seek protection in each state or the work could be copied in any state in which he was not protected and then circulated in competition with his copyrighted work.

The lack of efficient national protection afforded by unrelated state provisions prompted James Madison to urge that the federal government be given the power to extend patent and copyright protection.

> The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.[2]

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† Awarded First Prize in the 1967 Nathan Burkan Memorial Competition, St. John's University School of Law.

[1] For purposes of convenience only, the word "author" is used to designate the creator of a work which is copyrightable under the provisions of the federal statute.

[2] THE FEDERALIST No. 43, at 309 (B. Wright ed. 1961) (Madison).

With the adoption of the United States Constitution, authority to act in the area of copyright protection was bestowed upon Congress:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[3]

Although Congress acted swiftly in passing the first copyright act,[4] subsequent amendments have been infrequent; since 1790 there have been only three major revisions of the law.[5] With minor variations, the Act of 1909 comprises the present copyright law. The existing law provides a "dual" system of protection, allowing the states to provide protection *before* a work is published but making federal protection exclusive *after* publication.

Rapid technological advances, especially great developments in the communications industry, unimagined in 1909, have resulted in the inadequacy and obsolescence of many provisions of the present law. Therefore, for a number of years, the communications and publishing industries have clamored for a re-evaluation and revision of the federal statute. An extensive program of study[6] under the auspices of the Copyright Office culminated in a report by the Register of Copyrights urging a general revision of the law.[7] After further study and public hearings, a bill for the general revision of the Copyright Law was introduced in the Congress in 1967.[8]

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[3] U.S. CONST. art. I, § 8.

[4] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[5] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, ch. 330, 16 Stat. 198; Act of March 4, 1909, ch. 320, 35 Stat. 1075. The 1909 Act was enacted into positive law by the Act of July 30, 1947, ch. 391, 61 Stat. 652, as Title 17 of the United States Code.

[6] A compilation of thirty-five individual studies made pursuant to this program can be found in THE COPYRIGHT SOCIETY OF THE U.S.A., STUDIES ON COPYRIGHT (A. Fisher Memorial ed. 1963) [hereinafter cited as STUDIES ON COPYRIGHT].

[7] *Register of Copyrights, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, in 2 STUDIES ON COPYRIGHT 1199 [hereinafter cited as REGISTER'S REPORT].

[8] H.R. 2512, 90th Cong., 1st Sess. (1967) [hereinafter cited as PROPOSED LAW]. The bill was introduced in the House of Representatives by the Chairman of the House Judiciary Committee, Representative Emanuel Celler, and an identical bill, S. 597, was introduced in the Senate by Senator John L. McClellan. On February 27, 1967, the bill was approved by a House judiciary subcommittee and was reported back to the House Judiciary Committee. N.Y. Times, Feb. 28, 1967, § 1, at 20, col. 2. Subsequently, the bill received House approval and hearings were being conducted before a Senate Subcommittee. N.Y. Times, April 12, 1967, § 1, at 39, col. 1. A House Report has been issued to accompany the bill. H.R. REP. No. 83, 90th Cong., 1st Sess. (1967) [hereinafter cited as HOUSE REPORT].

The attempt to enact legislation capable of dealing with contemporary problems, yet flexible enough to adjust to future advances in communications and publishing, seems destined to result in the broadest copyright revision in the history of our country. Perhaps the most radical change, and the most fundamental characteristic of the proposed law, provides for the abolition of the "dual" system of copyright protection and substitutes in its stead unilateral federal protection for all copyrightable works.[9]

The purpose of this paper is to examine some of the inadequacies of the present "dual" system of protection and evaluate the effectiveness of the proposed "unilateral" system.

Common-Law Copyright

It is a generally accepted rule of law that copyright protection will not be extended to an abstract idea, but only to a tangible expression of that idea.[10] Thus, it is the author's manner of expression which is the subject of a copyright. For example, an artist may not prevent another from viewing the same scene, utilizing the same vantage point and thereby producing an identical work. He may only prohibit his own work from being copied or appropriated. Similarly, an author who verbally describes a scene will not be given an exclusive right to the words he uses. Rather, his arrangement of the words will be protected from wrongful use. Two people arriving at the same result, through individual efforts, might each be extended copyright protection.[11]

At common law, an author's rights in his work are in the nature of property rights.[12] As an incident of ownership, they exist independent of statutory authority [13] and are usually styled a "common-law copyright." That term is somewhat of an understatement, however, since the author's exclusive claim to his work permits him more than the mere privilege of copying it. The scope of these rights was settled, after much litigation, by the House of Lords in *Donaldsons v. Becket*,[14] wherein the court answered the question:

The pending legislation is basically the same as a bill introduced near the end of the 89th Congress. H.R. 4347, 89th Cong., 2d Sess. (1966). In October 1966, a report was issued to accompany that bill. H.R. REP. No. 2237, 89th Cong., 2d Sess. (1966).

[9] PROPOSED LAW § 301.

[10] Holmes v. Hurst, 174 U.S. 82 (1899); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

[11] In this regard, a copyright is distinguishable from a patent which grants exclusive protection to the first person to register his work.

[12] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[13] Desny v. Wilder, 46 Cal. 2d 715, 299 P.2d 257 (1956).

[14] 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

Whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed published and sold the same without his consent? [15]

Both issues were decided in the affirmative,[16] the court ruling that the right to publish and print would exist in perpetuity but for statutory provisions limiting it.[17]

Sixty years later the United States Supreme Court reached the same conclusions and considered it to be "well settled" that an author had a perpetual right to the exclusive use of unpublished manuscripts, but, once published, any further rights were contingent upon the federal copyright statute.[18]

Thus, the continued existence of common-law protection depends on state law [19] and can be abrogated or superseded by state law. Upon publication, however, prior protection extended either under the common-law doctrine or pursuant to a state statute ceases and thereafter federal law becomes the exclusive source of copyright protection.

An author's common-law rights are basically two-fold: *first*, he has the right to the exclusive use of his work until he permits a general publication;[20] and, *second*, he has the exclusive right to make or authorize the first general publication of his work. The protection against unauthorized use of a work is absolute; not even "fair use," the right of others to use the owner's work in a reasonable manner without his consent, is allowed.[21] An author may use his work in any manner he wishes, short of a general publication, exploit it commercially and enjoy the profits therefrom, without fear of the work being copied or becoming part of the public domain.

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[15] *Ibid.*

[16] *Id.* at 2409-17, 98 Eng. Rep. at 258-62. While ten of the eleven judges agreed that an author had first publication rights, only eight agreed on the right to a cause of action for unauthorized use.

[17] 8 Anne, c. 19 (1709). Pursuant to this statute authors whose works were already in print but had not been "published" were granted the exclusive right to print their works for 21 years after the effective date of the statute, whereas those works not printed but composed, or yet to be composed, were to receive a 14 year protection after the first publication.

[18] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 n.1 (1834).

[19] Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955).

[20] Stanley v. Columbia Broadcasting Sys., Inc., 35 Cal. 2d 653, 221 P.2d 73 (1950).

[21] *Ibid.* The right of fair use has been extended by case law interpreting the federal statute. For a study of the fair use doctrine *see* Latman, *Study No. 14; Fair Use of Copyrighted Works,* in 2 STUDIES ON COPYRIGHT 781.

Publication

Upon publication, the author's common-law copyright terminates and his work enters the public domain[22] unless further protection is granted by federal statute.[23] The Federal Copyright Law, which specifically recognizes common-law or state protection prior to publication,[24] begins protection of copyrightable works after publication, if the author takes the necessary statutory steps. The importance of publication, therefore, is clear: it serves as the divider between the pre-publication protection of the common law, or state law, and the post-publication protection of the federal statute or the entrance of the work into the public domain. After publication, an author loses all exclusive right to his work if he does not qualify for federal statutory protection or if he fails to take the steps necessary to obtain that protection.

Despite the legal significance of the term "publication," its meaning has been obscured by the fact that the federal statute lacks a definition. Conflict has arisen over whether the "publication" which terminates an author's common-law rights is the same "publication" as that which qualifies him for federal protection. The conclusion that they are one and the same, although subject to strong criticism,[25] is supported by the fact that Section 2 of the Copyright Law allows common-law protection only until federal protection begins.[26]

It has been suggested that the definitional difficulties could be eliminated by having the federal law define the word for its purposes and the states define it for the purpose of determining the limit of common-law or state protection. The danger of conflict between the two makes this solution unacceptable.[27] Perhaps a better solution would be a uniform federal definition.[28]

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[22] Worchmeister v. American Lithographic Co., 134 F. 321 (2d Cir. 1904).

[23] Mazer v. Stein, 347 U.S. 201 (1954).

[24] 17 U.S.C. § 2 (1964).

> Nothing in this title shall be construed to annul or limit the right of the author . . . of an unpublished work, at common law . . . to prevent the copying, publication, or use of such unpublished work without his consent.

[25] Kalodner & Vance, *The Relation Between Federal and State Protection of Literary and Artistic Property*, 72 HARV. L. REV. 1079, 1093 (1959).

[26] *Ibid.*

[27] *Id.* at 1094. "[I]n some instances, state protection which would be permissible under this position will conflict with the federal policy." *Ibid.*

[28] *Ibid.* The authors suggest two definitions: one divestitive of the common-law right and the other investitive of the federal protection. It has been asserted that "publication" is a federal question. Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 667 (2d Cir. 1955) (dissenting opinion).

Since the federal law has failed to assume this burden, the task has fallen to the courts to attempt to work out a definition on a case-by-case approach. A summary of the case law provides what seems to be the accepted definition of publication.

> [P]ublication occurs when by consent of the copyright owner the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur.[29]

A close study of this definition indicates two major problems which have arisen in connection with copyright protection. The first is that the definition speaks of *tangible copies*. Since the concept of common-law copyright originated when written and printed copies were the only anticipated means of reproduction and distribution of literary works, authors were protected only against the misappropriation of their work in those ways. The courts have strictly adhered to this "copy" requirement despite the development of new methods of distribution. It is accepted, almost without question, that the public performance or dissemination of a work other than by copies does not result in a publication of that work. For example, playing a musical composition has been held not to be a publication in the absence of the distribution of copies.[30] Similarly, neither delivery of a lecture[31] nor performance before a radio microphone[32] has been held to constitute publication. Despite strong criticism,[33] the "copy" concept of publication is still a viable principle of law. As a result, the author has the advantage of presenting his work to the public and profiting thereby without "publishing" and, thus, not losing his common-law copyright.

The second problem arising from the accepted case-law definition of publication is the requirement that the work be released to the "general public." This is contrasted to a "limited publication" which allows the author to release his work to an audience of a

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[29] Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 187 (1956) (italicized in original) (footnotes omitted).

[30] Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946).

[31] Nutt v. National Institute Inc. for the Improvement of Memory, 31 F.2d 236 (2d Cir. 1929).

[32] Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934).

[33] *See* Selvin, *Should Performance Dedicate?*, 42 CALIF. L. REV. 40 (1954).

limited size, whose use of the work is restricted, while retaining his common-law rights.[34]

These two inroads on the concept that publication terminates common-law rights often make it advantageous for an author to avoid utilizing the federal statutory protection and to continue the perpetual common-law protection of his work. Modern methods of communication and dissemination have made this practice even more attractive. For example, an author of a play can present it to an unlimited audience as often as he wishes and never lose the common-law protection as long as he does not distribute copies. Using radio and television, he can broadcast around the world and derive great financial benefit, while never endangering his common-law rights.

Federal Copyright Protection

As previously stated, common-law protection prior to publication is specifically acknowledged in the federal copyright statute. It is, in effect, a grant to the states of the power to act. Federal statutory protection, obtainable only after publication, gives the author a monopoly in his work for a limited time.[35]

From a reading of the constitutional grant of power,[36] it seems clear that Congress could extend federal protection at any time after the creation of copyrightable matter. By virtue of the Supremacy Clause of the Constitution, federal legislation would preempt any common-law rule or state enactment seeking to extend protection to a work which has entered the purview of the federal statute.[37]

No state may violate the copyright policy of the United States, even though that state attempts to do so by exercising its otherwise lawful powers. For example, many states have attempted to extend protection to matter not copyrightable under the federal statute by use of unfair competition legislation.[38] Such schemes

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[34] White v. Kimmell, 193 F.2d 744 (9th Cir. 1952).

> [A] limited publication which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a 'limited publication,' which does not result in loss of the author's common-law right to his manuscript. White v. Kimmell, *supra* at 746-47.

[35] Mazer v. Stein, 347 U.S. 201, 217 (1954).

[36] U.S. CONST. art. I, § 8.

[37] U.S. CONST. art. VI. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

[38] *See, e.g.*, International News Serv. v. Associated Press, 248 U.S. 215 (1918), wherein the Court found the copying of news material, non-copyrightable matter, by one agency, to be an unfair appropriation of the labor of the original news gathering agency.

have, however, generally been rejected. In *Sears, Roebuck & Co. v. Stiffel Co.*,[39] the Supreme Court rejected state protection of items not patentable under the federal law by means of unfair competition laws.

> Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws. . . . To allow a State by use of its laws of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public.[40]

While *Sears* involved the federal patent laws and made only passing reference to the copyright statutes, subsequent case law has held that state protection of literary property has also been preempted by federal law.[41]

The federal concept of copyright protection places the public benefit in a position of prime importance;[42] the author's reward, resulting from his monopoly, is only secondary. The author is given certain exclusive, enumerated rights,[43] but the public may use the work in any other way it wishes without having to answer to the author.

By offering the author a period of monopoly in his work and the opportunity to profit from its use, the federal law seeks to provide an incentive to utilize the federal system of protection rather than to continue common-law coverage. Once an author does seek federal protection, the public benefits since the "limited times" clause guarantees that the work will eventually enter the public domain. In return for his monopoly, the author abandons all exclusivity in his work after the expiration of the statutory period of protection. Unless given an adequate period of exclusive use, an author may lack the incentive to publish his work and may continue to utilize common-law protection. Such avoidance of the federal scheme might result in public deprivation of much literary material. Therefore, the "limited time" must be sufficiently long

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[39] 376 U.S. 225 (1964). *See also* a companion case, Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

[40] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231-32 (1964). The Court admitted that the states' power to protect the consumer against product confusion, by means such as control of labels, was unaffected by the decision.

[41] *See, e.g.*, Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964).

[42] Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932).

[43] 17 U.S.C. § 1 (1964).

to provide incentive for authors, yet short enough not to impair the public benefit. Under existing law, copyrightable works are protected [44] for twenty-eight years from the date of first publication with the opportunity for renewal granted to the author, his heirs or executors for an additional period of the same length.[45] In addition to protecting published works, the federal statute provides protection for unpublished works through a system of voluntary registration.[46]

It is clear that the dual system of copyright protection has certain inherent problems which have been intensified with the advent of modern methods of communication. When the present copyright law was enacted, mass dissemination of literary material was accomplished mainly by printed copies. The benefits to be derived by an author who refrained from general publication were limited and it was generally more advantageous to utilize the federal protection. Present-day means of dissemination no longer make publication so attractive since an author can often benefit financially for a longer period by methods other than the distribution of copies.

As previously discussed, the extent of state protection of unpublished material greatly differs. This is compounded by the fact that modern methods of communication permit a work to be rapidly transmitted across state boundaries and, thus, become subject to the laws of more than one jurisdiction. In addition, the conflict between state and federal law is accentuated by the vague definition of "publication" which has been utilized to determine the applicability of either form of protection. A further difficulty founded in the dual system of protection is that federal protection can be provided only for a limited period while the common law can extend perpetual protection and still allow broad dissemination of a work. The author who invokes his federal right to protection may, in effect, be penalized for so doing. Thus, many authors avoid publication and the public is deprived of the use of these works. Such a result is clearly contrary to the constitutional concept of public benefit.

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[44] Copyright protection is secured by publication of the work containing notice of copyright. 17 U.S.C. § 10 (1964). After such publication, two complete copies of the work must be deposited with the Register of Copyrights [17 U.S.C. § 13 (1964)] and a claim of copyright must be registered. 17 U.S.C. § 11 (1964). Unless these last two provisions are complied with, no action may be maintained for copyright infringement.

[45] 17 U.S.C. § 24 (1964). An application for renewal must be made to the copyright office not more than one year prior to the expiration of the original term.

[46] 17 U.S.C § 12 (1964).

Federal Copyright Law Revision

Congress, aware of the various shortcomings of the dual system, sought to entirely eliminate them in the revision. Three alternatives have been suggested.[47]

The first proposal, and the one which would probably have been least effective, provided for the continuation of the present dual system. However, the voluntary registration provisions would have been broadened to allow registration of all types of unpublished works. Common-law protection would have continued for any work not registered. While this system had the advantage of providing protection to any work made available to the public by means other than publication, it failed in one major respect:

> [U]npublished works not voluntarily registered, though widely disseminated by performance or exhibition, would continue to have perpetual protection under the common law.[48]

The second method of revision would have retained common-law protection until "public dissemination" occurred, at which time federal statutory protection would be available.[49] With one qualification, it was this method which the Register of Copyrights advocated.

> We believe that the constitutional principle of a time limitation should be applied when a work is disseminated to the public, whether by the publication of copies or registration, as under the present law, or by public performance or the public distribution of sound recordings. We also believe that any statutory limitations imposed in the public interest on the scope of copyright protection should apply when a work has been publicly disseminated in any of these ways.[50]

Undisseminated material, the Register suggested, should continue to be afforded common-law protection.

This proposal received widespread support since it was not a drastic change from the existing system. The transition, therefore, would be simpler and the procedure under the act would be more acceptable to those working in the copyright area. How-

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[47] Strauss, *Study No. 29; Protection of Unpublished Works*, in 1 STUDIES ON COPYRIGHT 189, 217.

[48] Strauss, *Study No. 29; Protection of Unpublished Works*, in 1 STUDIES ON COPYRIGHT 189, 218.

[49] *Ibid.* "The phrase 'public dissemination' is used here in the sense of communicating a work to the public visually or accoustically by any method and in any form, whether permanently fixed or not."

[50] REGISTER'S REPORT 1240. The Register stipulated that "fixation of a work in some tangible form would be a requirement of its copyrightability." *Id.* at 1241.

ever, the fear that many of the same problems which exist under the present statute because of the failure to define "publication" would also arise with the use of a new, undefined (or vaguely defined) word "dissemination," [51] resulted in rejection of this method of revision.

The last, and most radical, method contemplated the abolition of common-law protection for all copyrightable works. Material would be protected by federal statute from the date of creation regardless of dissemination or publication. The Register had rejected this approach as inferior to the dual system of protection, stating that there were "overbalancing reasons to preserve the common-law protection of undisseminated works until the author or his successor chooses to disclose them." [52] The Register felt that the bulk of undisseminated material was personal correspondence, manuscripts and other private material which the author, if he so desired, should be able to keep out of the public domain. Under the third proposal, *all* works would be subjected to a statutory period of protection after which they would be available to the public. There seemed to be a danger that the author of a private manuscript dealing with a controversial subject might destroy his work rather than allow it to become available to the general public and subject himself or his heirs to public comment.[53] The Register further objected to this system since it would require that the federal courts exercise exclusive jurisdiction in copyright matters.[54] It was his contention that undisseminated works, usually matters of local concern, should be dealt with by the state courts.

Provisions of the Proposed Law

Despite the objections noted, the drafters of the new legislation, in seeking to attain the constitutional ends of uniformity of protection for authors and the furtherance of public benefit through the advancement of scholarship, adopted the third scheme of revision.

Under the proposed law, all copyrightable material, whether published or not, will be protected exclusively by the federal statute

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[51] *See, e.g.*, HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 74 (Comm. Print 1963).

[52] REGISTER'S REPORT 1241.

[53] *Ibid.* Realizing, however, that the public has much to gain from some private manuscripts, the Register thought a compromise could be arranged.

> We believe that the right of privacy and the interests of scholarship can be balanced by a special provision for the use of manuscript material that is made accessible to the public in a library or other archive. REGISTER'S REPORT 1241.

[54] *Id.* at 1242.

from the time of creation.[55] When a work is "fixed in a tangible medium of expression" [56] it is deemed to have been created. By extending protection from the day of creation, one major obstacle encountered in the present law will be removed. It will no longer be necessary for the courts to struggle to define publication or any similar term in order to find the division between common-law (or state) and federal protection.[57]

The preemption section permits neither common-law nor state protection of any copyrightable work,[58] even if that work has been *published* and fails to qualify for a federal copyright or has already passed into the public domain [59] due to the expiration of the statutory period of protection. This is, in effect, a codification of the *Sears* line of cases, holding that the states cannot "block off from the public something which the federal law has said belongs to the public." [60]

The proposed law, however, does not preempt the common-law or state legislation in three limited areas: (1) protection of *unpublished* materials not copyrightable under the statute (including works not "fixed"); (2) in respect to causes of action which arise prior to the effective date of the statute (January 1, 1969); and, (3) where state action is taken against activities other than violations of an author's copyright protection.[61] The first area indicates the continuance of the *Wheaton v. Peters* [62] doctrine that publication terminates common-law protection; the last indicates that the doctrine of the *Sears* case, admitting the states' power to prevent unfair competitive practices, has not been abrogated by the new statute.

Advantages of the Proposed Law

The framers of the new legislation found several major advantages in a uniform system.[63] First, the uniform system alle-

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[55] PROPOSED LAW § 301(a).

[56] PROPOSED LAW § 101.

> A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

[57] HOUSE REPORT 96.

[58] PROPOSED LAW § 301(a). "[N]o person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State."

[59] HOUSE REPORT 98.

[60] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 232 (1964).

[61] PROPOSED LAW § 301(b).

[62] 33 U.S. (8 Pet.) 591 (1834).

[63] HOUSE REPORT 96.

viates the problem of reconciling the differences between state laws and between state law and federal law. The exclusive federal provisions will only be subjected to the interpretations of the federal courts, thus minimizing the danger of conflicts. Unpublished, non-copyrightable material which is left to state control under the proposed law will generally be of an extremely local nature and the danger of such matter bringing about a conflict between the laws of two jurisdictions is minimal. For example, an impromptu, unrecorded performance before an audience would not be copyrightable under the proposed legislation and would fall within the area reserved to the states to provide protection. Since such a performance is only of a transitory nature, there is little likelihood that it could be subjected to the laws of any jurisdiction other than the one in which it was performed.

As noted, the new statute eliminates the difficulties involved in the lack of definition of publication. Since the creation of a copyrightable work would result in the applicability of the federal statute and thus federal protection, it would become unnecessary to continue to determine the point at which a work passes from the common-law sphere of protection. Of greater significance is the fact that the broad definition of "creation" gives the proposed law sufficient latitude to encompass the various means of communications present in our society.

Another advantage of the new system is that it seems to be more in accord with the constitutional concept of extending protection to authors for a "limited time." An author will no longer be able to retain maximum protection by maintaining protection under the common law. Protection to all authors will be uniform and no advantage will be gained by avoiding the statutory provisions.[64]

Conclusion

The preemption provisions of the new copyright bill seem to benefit both the general public and authors. By providing exclusive federal protection, all works will eventually enter the public domain. No longer will an author be able to hide under the com-

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[64] A single system of copyright protection is used by most of the nations of the world and, thus, the new legislation has the further advantage of aligning the United States with these other nations. The new system will help insure that no disparity will exist between the protection accorded foreign authors and that available to domestic authors. For a brief discussion of the concepts of international copyright law *see* M. NIMMER, COPYRIGHT § 65 (1966).

In conjunction with this global uniformity, the new legislation adopts a longer period of statutory monopoly, protecting a work from the date of creation until fifty years after the author's death. This is the same period of protection granted in most other countries. PROPOSED LAW § 302.

mon law and exploit his work without endangering his exclusivity. Furthermore, the longer period of protection will make the federal statutory protection more appealing to authors.[65]

While the public clearly benefits from the eventual release of all literary works into the public domain, one aspect of such a scheme is subject to severe criticism—the release of private papers and manuscripts. While it is true that after a sufficient period of time following an author's death the importance of privacy may decline, there is definitely a strong interest in the individual's right to protect his private work from the peering eye of the general public. There is a real danger that many documents such as private correspondence and diaries, will be destroyed, although this could be overcome by the retention of such works in libraries or archives, available to scholars, but removed from the grasp of the general public.[66]

One advantageous change which will result from the new system is that all causes of action involving copyright protection under the new law will be within the exclusive jurisdiction of the federal courts,[67] thus minimizing the conflicts between court interpretations of the statute.

It seems, in conclusion, that the benefits to be derived from the proposed scheme of protection greatly outweigh its shortcomings. After too long a wait, the United States seems prepared to equip itself with copyright legislation capable of meeting the needs of our technologically advanced society.

THE EFFECT OF WORKMEN'S COMPENSATION AWARDS ON RECOVERY UNDER MVAIC

The Motor Vehicle Accident Indemnification Corporation Law[1] was enacted in 1958 to remedy the failure of New York's then existing financial responsibility laws[2] to protect the innocent

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[65] Under PROPOSED LAW § 304(a) the time of renewal is extended from 28 to 47 years for those works which are in their first term of copyright protection when the statute becomes effective.

[66] Such a system was urged by the Register. REGISTER'S REPORT 1241.

[67] 28 U.S.C. § 1338 (1964).

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

[1] N.Y. INS. LAW art. 17-A [hereinafter referred to as MVAIC].

[2] N.Y. VEHICLE & TRAFFIC LAW art. 6 (Motor Vehicle Financial Security Act of 1956); N.Y. VEHICLE & TRAFFIC LAW art. 7 (Motor Vehicle Safety Responsibility Act of 1929).